FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 514.

D. B. HEINER, Collector of Internal Revenue, Twenty-third District of Pennsylvania, Pittsburgh, Pennsylvania,

vs.

JOHN H. DONNAN, SIDNEY B. DONNAN, ALVAN E. DONNAN and DOROTHY D. WHITWORTH, Executors and Trustees of the Estate of JOHN W. DONNAN, Deceased, of Washington, Pennsylvania.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

MOTION AND BRIEF OF SAMUEL W. FORDYCE, HENRY J. RICHARDSON AND C. POWELL FORDYCE, AS AMICI CURIAE, AND ON BEHALF OF THE ST. LOUIS UNION TRUST COMPANY AND ANDREW W. JOHNSON, EXECUTORS OF THE ESTATE OF JACKSON JOHNSON, DECEASED.

SAMUEL W. FORDYCE,
HENRY J. RICHARDSON,
C. POWELL FORDYCE,
Amici Curiae.

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On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May It Please the Court:

The undersigned, as counsel for the St. Louis Union Trust Company and Andrew W. Johnson, as executors, respectfully move this Honorable Court for leave to file the accompanying brief in this case as amici curiae.

SAMUEL W. FORDYCE,
HENRY J. RICHARDSON,
C. POWELL FORDYCE,
Counsel for the St. Louis Union Trust Company and Andrew W. Johnson, as Executors.

Amici Curiae.

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On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF OF AMICI CURIAE.

This brief, by permission of the Court, and with the consent of counsel for the respective parties, is filed by the undersigned as amici curiae, and on behalf of the St. Louis Union Trust Company and Andrew W. Johnson, both of St. Louis, Missouri, as executors under the last will and testament of Jackson Johnson, deceased, and also on behalf of the St. Louis Union Trust Company, as executor of other estates, wherein the questions here presented are involved.

FACTS.

The facts in the case in suit are set out in the opinions of the District Court for the Western District of Pennsylvania. The opinion of said Court on the Collector's statutory demurrer to the executor's statement is reported at 48 Fed. (2d) 1058; and its final opinion, though not officially reported, may be found at No. 1515 Prentice Hall 1931 Federal Tax Service, or par. 9464 Commerce Clearing House 1931 Federal Tax Service, Vol. 313.

Resume of Facts Involved in One of the Cases Represented by the Undersigned.

Jackson Johnson, a resident of St. Louis, Missouri, died on January 23, 1929. In his last will he named the St. Louis Union Trust Company and Andrew W. Johnson as executors thereof. After the effective date of the Revenue Act of 1926, viz., February 26, 1926, and within two years of his death, the decedent made gifts of property valued at approximately $1,268,281.37. The Commissioner of Internal Revenue has admitted that none of these gifts were actually made in contemplation of death, but asserts that they are made taxable by the conclusive presumption in the second sentence in Section 302 (c) of the Revenue Act of 1926. The executors have paid the tax based on said gifts, and have filed a claim for refund thereof. The action to be taken upon this claim will depend upon the decision of this Court in the case at bar. The executors, there-

fore, have a direct and substantial pecuniary interest in the questions presented in this case.

ISSUES.

The issues involved in this case are presented in the following two questions, certified by the United States Circuit Court of Appeals for the Third Circuit:

(1) Does the second sentence of Section 302 (c) of the Revenue Act of 1926 violate the due process clause of the Fifth Amendment to the Constitution of the United States?

(2) If the answer to the first question be in the negative, is the second sentence of Section 302 (c) of the Revenue Act of 1926 void because repugnant to sections 1111, 1113 (a), 1117 and 1122 (c) of the same act?

This brief is addressed only to the first question.

SUMMARY OF ARGUMENT.

The second sentence of Section 302 (c) of the Revenue Act of 1926 establishes a conclusive presumption that all gifts over $5,000, made after February 26, 1926, and within two years of death, are in contemplation of death.

In U. S. v. Wells, this Court has recently said that the dominative motive and impelling cause of such gifts must be the thought of death.

Construing section 302 (c) and U. S. v. Wells together, it is apparent that the tax imposed by said section has no regard for actualities, and that, as applies to cases where gifts were made without such motive, it is based upon a pure figment of Congressional imagination.

The constitutional issues here involved have been indirectly passed upon by this Court in Schlesinger v. Wisconsin, and by the Supreme Courts of Kentucky and Louisiana. They have been directly passed upon by two Circuit Courts of Appeal, four District Courts, and the Board of Tax Appeals. In all such cases conclusive presumptions of contemplation of death have been held unconstitutional. Such cases should be conclusive.

The Collector denies the applicability of Schlesinger v. Wisconsin, and declares that the presumption in section 302 (c) is a rule of substantive law. Considered as establishing such a rule, this section is unconstitutional for the following reasons:

(1) Congress has no power to disregard the element of "contemplation of death" in levying estate taxes. Such taxes cannot be rested upon anything except testamentary dispositions and substitutes therefor. The tax embraced in section 302 (c) cannot be justified upon any theory of inheritance or estate taxation heretofore sanctioned by this Court.

(2) This section establishes an arbitrary, whimsical, burdensome and unreasonable classification, which is contrary to experience and is contrary to due process of law.

(3) By measuring the tax on an estate by the property of another person, this section violates fundamental principles upon which our Government, and all free governments, are based, and results in such a flagrant inequality between the burdens imposed and benefits received that it constitutes a taking of private property for public use without just compensation — amounts to extortion and spoliation under the guise of taxation.

Nor can this conclusive presumption be justified upon the theory that the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secure. This theory is properly applicable to police power cases where no effort is made to equalize public burdens—to strictly regulatory and not to revenue measures. This Court has refused to apply it in matters of taxation except where it was necessary to reach substitutes for testamentary dispositions which

constitute evasion of estate taxes. The limitations upon the use of that theory given by Mr. Justice Hughes prevent its application in the case at bar. Moreover, its application is not necessary to prevent evasion of estate taxes. Over a billion dollars have been collected with the aid of the prima facie presumption. Congress can pass another gift tax. Furthermore, if taxation of gifts is a necessary public burden to prevent tax evasion, then fairness demands that all who make gifts equally share that burden. Such a burden should not be cast entirely upon those who, regardless of their age, health or actual motive, chance to die within two years after their gift.

If section 302 (c) does not establish a rule of substantive law, it must establish a rule of conclusive evidence. Viewed as a rule of conclusive evidence, it is unconstitutional because it constitutes an invasion of the exclusive and indestructible province of the judiciary to determine the existence and truth of facts in issue; because it deprives the individual of his right to be heard and present his defense, and thus deprives him of the most fundamental requirement of due process of law; and because it is an irrational and arbitrary legislative fiat which this Court has said cannot take the place of facts in matters involving property rights.

Presumptions are indulged to supply the place of facts, and should not be allowed against clearly ascertained and established facts. When facts appear, presumptions should disappear.

Congress cannot pass conclusive rules of evidence, and cannot use them as a means of indirectly violating constitutional restrictions. It cannot make any process "due process" by its mere will. It cannot make constitutional guaranties yield to mere convenience.

The Fifth Amendment should be liberally construed and rigidly enforced to prevent the invasion of the private rights of the individual by section 302 (c). To uphold the constitutionality of that section is to leave Congress subject to no effective restraint, and to make the Fifth Amendment a rope of sand. Private property should be held sacred.

For these reasons, the answer to the first question should be: "Yes."

ARGUMENT.

The second sentence of Section 302 (c), of the Revenue Act of 1926, violates the due-process clause of the Fifth Amendment of the Constitution of the United States.

Section 302 of the Revenue Act of 1926 (26 U. S. C. A. 1094, Feb. 26, 1926, c. 27, s. 302, 44 Stat. 70) provides that the value of the gross estate of a decedent shall be determined by including the value of all property, real or personal, tangible or intangible. Paragraph (c) of this section reads as follows:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. **Where within two years prior to his death but after February 26, 1926, and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000.00, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning**

of this chapter. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to February 26, 1926, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this chapter."

In United States v. Wells, 283 U. S. 102, Chief Justice Hughes, in defining the phrase, "in contemplation of death," said that the differentiating factor between a gift made in contemplation of death and the ordinary gift inter vivos must be found in the transferor's motive. Furthermore, he said that for the gift to fall in the former class, the controlling and dominative motive, which was the inducing and impelling cause of the transfer, must be the thought of death—must be of the sort which leads to testamentary dispositions—and must be for purposes associated with death rather than life.

By the second sentence of Section 302 (c) Congress declared that, if one made a gift after February 26, 1926, and the wheels of fortune ordained that he die within two years thereafter, then, regardless of his actual motive, or his age, health, or cause of his death, whether natural and expected, or accidental and unexpected, the dominative motive which impelled him to make the gift should be deemed and held to be the thought of death. This attempt to establish one's motive by legislation—to base

taxes upon pure figments of the congressional imagination —is startling to say the least.

The first question certified to this Court is: Does the second sentence of Section 302 (c), of the Revenue Act of 1926, violate the due-process clause of the Fifth Amendment to the Constitution of the United States?

We respectfully submit that this question should be answered in the affirmative.

The constitutional issues here involved were directly passed upon by this Court in the case of Schlessinger v. Wisconsin, 270 U. S. 230, which was decided on March 1, 1926, or three days after the effective date of the Revenue Act of 1926. In that case this Court held that the conclusive six-year presumption contained in the Wisconsin Inheritance Tax Act (Section 1087-1 [3], ch. 64 ff. Wisc. Stat. 1919) was a violation of the due process and equal protection clauses of the Fourteenth Amendment. The opinion of the Court was given by Mr. Justice McReynolds, who, in part, said (at pages 239 and 240):

> "The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have

been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction.

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against 'B.' Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

"* * * A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid. Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, 55 L. Ed. 78, 80, 32 L. R. A. (n. s.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243, discusses the doctrine of presumption."

Mr. Justice Holmes dissented, saying (at page 241):

"Of course many gifts will be hit by the tax that were made with no contemplation of death. But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured. A typical instance is the prohibition of the sale of unintoxicating malt liquors in

> order to make effective a prohibition of the sale of beer. The power 'is not to be denied simply because some innocent articles or transactions may be found within the prescribed class.' Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 201, 204 * * *."

For convenience, this theory of Mr. Justice Holmes will be hereinafter referred to as the "penumbra theory."

We contend that this language effectively and succintly answers all of the arguments which can be made in favor of a negative answer to the first question certified. Were it not for the fact that the present case involves a two, instead of a six, year conclusive presumption, and involves the Fifth, instead of the Fourteenth, Amendment, nothing more would need to be said. These distinguishing features, however, are stressed by the collector, who denies that the Schlesinger case is controlling. In this opinion he is at variance with the Circuit Courts of Appeal of the First and Second Circuits, five District Courts and the Board of Tax Appeals.

The cases in which the second sentence of section 302 (c) has been held a violation of the Fifth Amendment are: The case at bar; Hall v. White, 48 Fed. (2d) 1060, April 6, 1931, Morton, District Judge, on demurrer, affirmed White v. Hall, 53 Fed. (2d), Advance Sheets, p. 210, Circuit Court of Appeals, First Circuit, before Bingham and Wilson, Circuit Judges, and Morris, District Judge, November 3, 1931, Supreme Court Docket No. 636; Guiltz-

burg v. Anderson, 51 Fed. (2d) 592, Coxe, District Judge, July 28, 1931, on motion to dismiss complaint for insufficiency in law, affirmed by the Circuit Court of Appeals for the Second Circuit on December 7, 1931, opinion reported at paragraph 9670, volume 313, Commerce Clearing House Federal Tax Service 1931, before Hand, Swan and Chase, Circuit Judges, Supreme Court Docket 689; Delaware Trust Co. v. Handy, 51 Fed. (2d) 867, August 28, 1931, on special demurrer, Nields, District Judge, on merits, 53 Fed. (2d), Advance Sheets, p. 1042, Supreme Court Docket 546; see Mather v. McLaughlin, December 17, 1931, District Court Ohio, Dickinson, District Judge, not yet reported, except at paragraph 9023, volume 323, Commerce Clearing House Federal Tax Service for 1932; American Security and Trust Co., Executors Lincoln Estate, v. Commissioner, 24 B. T. A. 334, October 16, 1931; Cromwell v. Commissioner, 24 B. T. A. 461, October 26, 1931; and Littauer v. Commissioner, 24 B. T. A. 983, November 27, 1931, Division Report, reviewed by full Board and affirmed on December 31, 1931, 25 B. T. A. ... (Commerce Clearing House Board Dec. No. 7354), in which the Government conceded the unconstitutionality of section 302 (c). See also Uihlein v. Wisconsin, 273 U. S. 642; State Tax Commission v. Robinson's Executors, 28 S. W. (2d) 491, Ky. Court of Appeals, May 20, 1930 (three-year conclusive presumption held unconstitutional); and Succession of Williams, 129 So. 801, 171 La. 151, Supreme Court of Louisiana, June 2, 1930—in all of which the courts fol-

lowed the Schlesinger case in regard to the state inheritance tax acts there involved.

The cases mentioned just above are all based primarily upon the Schlesinger case. The **express** legal propositions for which they stand may be summarized as follows:

(1) That the Schlesinger case cannot be distinguished on the ground that the Wisconsin statute provided for a six, instead of a two, year conclusive presumption [Donnan v. Heiner, 48 Fed. (2d) 1058; Hall v. White, 48 Fed. (2d) 1060; Guinzburg v. Anderson, 51 Fed. (2d) 592; Guinzburg v. Anderson (C. C. A.), 313 C. C. H., par. 9670; American Security & Trust Co. v. Commissioner, 24 B. T. A. 334; and see State Tax Commission v. Robinson's Executors, supra].

(2) That the Schlesinger case cannot be distinguished because the Fourteenth Amendment was involved instead of the Fifth [Donnan v. Heiner, 48 Fed. (2d) 1058; Guinzburg v. Anderson, 51 Fed. (2d) 592, and American Security & Trust Co. v. Commissioner, supra].

(3) That the Schlesinger case cannot be distinguished because the Wisconsin statute provided for an inheritance tax instead of an estate tax [American Security & Trust Co. v. Commissioner, supra; and see also New York Trust Co. v. Eisner, 256 U. S. 345, at pp. 348, 349].

(4) That the Revenue Act of 1926 is more arbitrary than the Wisconsin act involved in the Schlesinger case, be-

cause the former provides for a shorter period and applies to only a part of the gifts inter vivos [American Security & Trust Co. v. Commissioner, supra].

(5) That it is arbitrary and unreasonable to tax an estate or person on a state of facts which do not exist, and which the estate or person taxed is not permitted to show do not exist [Hall v. White, 48 Fed. (2d) 1060].

(6) That mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property [Hall v. White, 48 Fed. (2d) 1060, quoting from Manley v. Georgia, 279 U. S. 1, at p. 6; and see Hall v. White, 53 Fed. (2d), Advance Sheets 210, C. C. A.].

(7) That the second sentence in section 302 (c) establishes a two-year conclusive presumption, which amounts to the legislation of the donor's motive, to the fixing of a fact by legislative fiat, and is a denial of due process of law [American Security & Trust Co. v. Commissioner, supra].

(8) That the interest of the decedent is not subject to the Federal Estate Tax when death plays no part in the transfer [Guinzburg v. Anderson, 51 F. (2d) 592; American Security & Trust Co. v. Commissioner, supra] and see also May v. Heiner, 281 U. S. 238, at page 243; and Bradley v. Nichols, 13 Fed. (2d) 857, at page 859, affirmed 27 Fed. (2d) 47, in which latter case the Court said:

> "The United States has no power to tax gifts inter vivos, except to the extent that they are so related

to the death of the donor as to constitute in fact anticipated succession to his property. * * * To say that property which has been completely given away, and upon the disposition of which the donor's death has no effect, is still a part of the donor's estate, is to say something which is simply not true."

(9) That the tax cannot be sustained as an inter vivos gift tax under the authority of Bromley v. McCaughn, 280 U. S. 124 [Guinzburg v. Anderson, 51 F. (2d) 592; American Security & Trust Co. v. Commissioner, supra; and see also Reinecke v. Northern Trust Co., 278 U. S. 339, at page 347; and Y. M. C. A. v. Davis, 264 U. S. 47].

(10) That if the controlling motive for the gift is not the thought of death, the Revenue Act of 1926 does not embrace it [Guinzburg v. Anderson, 51 Fed. (2d) 592; and American Security and Trust Co. v. Commissioner, supra].

(11) That the tax on gifts not actually made in contemplation of death cannot be sustained as a necessary adjunct of the taxing power in order to prevent tax evasion [Guinzburg v. Anderson, 51 F. (2d) 592].

(12) That the revenue which the Revenue Act of 1926 is designed to produce is safeguarded by virtue of the rule which makes the determination of the Commissioner, that a gift was made in contemplation of death, prima facie correct [American Security & Trust Co. v. Commissioner, supra].

On page 16 of his brief the Collector states:

> "Considered as creating a conclusive presumption, the statute establishes a rule of substantive law and not a mere rule of evidence."

In making this statement the Collector apparently adopts the theory of Professor Wigmore, set forth in his work on Evidence (Second Edition, Vol. 5, Sec. 2492, p. 453) wherein it is said:

> "In strictness, there cannot be such a thing as a 'conclusive presumption.' Whenever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule really provides that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case. And to provide this is to make a rule of substantive law. * * *"

See also Chamberlayne "The Modern Law of Evidence," Vol. 2, page 1445, Sec. 1160.

To consider Section 302 (c) as establishing a rule of substantive law, we must say that Congress really declared that when an inter vivos gift and death within two years thereafter are shown, then the existence of the element of contemplation of death is wholly immaterial. Stated conversely, we must say that Congress declared that a gift within two years of death, in and of itself, and by virtue

of its own force, is conclusive. Such action by Congress would seem not to be an infringement upon the exclusive prerogative of the judiciary to determine the truth of a fact in issue, for the fact of contemplation of death is not in issue (see Wigmore on Evidence, [2d Edition] Vol. 2, Sec. 1353, pp. 1055, 1056).

However, even assuming for the sake of argument that this section creates a rule of substantive law, we contend that it is unconstitutional because Congress has no power to levy an estate tax upon the excess over $5,000.00 of gifts made within two years of death, but not made in contemplation thereof. Congress cannot declare unnecessary what the Constitution makes necessary.

While recognizing that names do not control Congress, we think that this conclusion is indicated by the fact that such taxation cannot be brought within any definition of estate or inheritance taxation adopted by this Court. The generating source of this tax is not death, but a gift, and death within two years thereafter; it is not rested on the power to transmit or the transmission of property as a result of death, for title to the gift necessarily vests before death. (See Knowlton v. Moore, 178 U. S. 41, at pages 47, 56, 57.) At the death of Mr. Donnan there was no completion of that shifting of the economic benefits of the property transferred which was described as the real subject of the tax in Chase National Bank v. U. S., 278 U. S. 327, at page 338; Reinecke v. Northern Trust Co., 278 U. S. 339, at page 346, and Saltonstall v. Saltonstall, 276 U. S. 260,

at page 271. At that time the gift was not incomplete; no power had been reserved over the use and economic enjoyment of the property, which was then terminated. The transfer here involved was not testamentary in character, was lawful when made, and was then beyond recall, even for the purpose of paying the tax. (See May v. Heiner, 281 U. S. 238, at page 243, and Nichols v. Coolidge, 274 U. S. 531, at page 542.) No interest of his in these gifts ceased by reason of his death. (See Y. M. C. A. v. Davis, 264 U. S. 47, at page 50.) Furthermore, the death of Mr. Donnan was not the generating source of any accessions to the property rights of his donees, and did not bring into being, enlarge or ripen any property rights for those who survived him, of such a character as to make appropriate the imposition of a tax upon that result, within the meaning of Tyler v. U. S., 281 U. S. 497, at pages 502, 504. The actual results brought about by his death to the recipients of his gifts inter vivos was—nothing. Death was not an indispensable event, so far as their full enjoyment of the property was concerned. (See Klein v. U. S., 283 U. S. 230, at page 234.) For these reasons, if the two-year conclusive presumption in section 302 (c) is to be justified, it must be upon some theory other than those which have heretofore been sanctioned by this Court.

Moreover, even considered as a rule of substantive law, this conclusive presumption is a violation of due process of law because based upon an arbitrary, whimsical and burdensome classification which has no regard for actuali-

ties. All gifts over $5,000, and within two years prior to death, are classed together as having been caused by the thought of death—by purposes associated with death instead of life. This classification might be reasonable in the case of a man of the age of 71, who, according to mortality tables, might be expected to die in two years. (See American-Canadian Mortality Investigation 1900-1915, p. 53). Moreover, it might be reasonable as to one in poor health. However, it certainly is not reasonable where a young and healthy person is concerned, as is shown in the case of Mercantile-Commerce Bank & Trust Co. and Malvern B. Clopton, Executors of the Estate of James Theodore Walker, Deceased, Petitioners, v. Commissioner of Internal Revenue, Respondent, Docket No. 45,121, which is now awaiting trial before the Board of Tax Appeals. In that case Walker made a transfer of $500,000 in trust to pay the income thereof to his stepfather for life. At that time Walker had just attained the age of 21 and was in perfect health. Two weeks later he happened to be killed in an airplane accident. Nothing could be more arbitrary and whimsical than to attribute to him, who under mortality tables had a life expectancy of approximately forty-five years (see American-Canadian Mortality Investigation 1900-1915, p. 53), the thought of death as the dominative motive and impelling cause of this transfer. In fact, it was made because of his great wealth and his love for his stepfather. The fact that anyone will die within two

years from a given event is pure chance. When one makes a gift he cannot foresee the date of his death. So far as he can know, his gift is not in contemplation of death, is lawful, and is no evasion of estate taxes. Whether the transfer will ever be taxed is, as Judge Hand said, in his concurring opinion in Frew v. Bowers, 12 F. (2d) 625, at page 630:

> "* * * is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

Thus also in Blodgett v. Holden, 275 U. S. 142, at page 147, it was said:

> "It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequences, made absolute dispositions of his property by gifts should thereafter be required to pay a charge for so doing."

There must be a reason for classification as distinguished from mere accident.

The accident of death within two years after a gift does not ipso facto confer that testamentary character upon it which is necessary to make it the subject of an estate tax. In this connection the language of this Court in Nichols v. Coolidge, 274 U. S. 531, at page 542, is pertinent:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estate must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. (See Frew v. Bowers [C. C. A. 2d], 12 F. [2d] 625.)"

The classification in section 302 (c) is as arbitrary as one lumping together all gifts made within two years of marriage or any other event. It is wholly illusory. And, finally, it is not according to any reasonable practice rule drawn from experience (1 Cooley on Taxation, 4th Ed., p. 717), but rather is contrary to the experience gained by the Government in the cases under all Federal Estate Tax Acts from 1916 to the 1926 Act. (See cases cited in footnote 1,

p. 11 of Collector's Brief, in which the Government, though aided by a prima facie presumption, failed to establish that the gifts were actually made in contemplation of death.) Arbitrary selection can never be justified by calling it classification (Gulf, etc., Rr. Co. v. Ellis, 165 U. S. 150, at p. 159).

But even though the classification in Section 302 (c) could be defended upon the grounds urged by the Collector, that section is unconstitutional because it violates the fundamental principles upon which our Government, and all free governments, are based. Thus in Knowlton v. Moore, 178 U. S. 41, at page 77, it was said:

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of property of another, thus bringing about * * * profound equality * * *, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

Again, in Hoeper v. Tax Commission of Wisconsin, 76 L. Ed. Advance Sheets, No. 4, p. 145, at p. 147, Justice Roberts said:

> "We have no doubt that, because of fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's prop-

erty or income by reference to the property or income of another is contrary to due process of law. * * * That which is not, in fact, the taxpayer's income cannot be made such by calling it income."

So also, in Frew v. Bowers, 12 Fed. (2d) 625, at pages 628-629, Judge Hough said:

"But, if the technical construction is wrong, then we must face the question whether it is within the power of Congress to do what has been done, i. e., use the property of A as a measure for the tax to be laid upon B. Thus stated, it would seem impossible to support the tax; attack must be on the form of statement. We have at great length examined the assemblage of phenomena that make up this case, in order to ascertain what they amount to; and we think the foregoing an accurate statement of what the tax at bar really is.

"If that description be accepted, while there is no classification of taxpayers, the tax itself is 'arbitrary and capricious' (Barclay v. Edwards, 267 U. S. 442, 450, 45 S. Ct. 135, 348 [69 L. Ed. 703]). Further, a tax on a transfer by A, but measured by anything other than the estate of A, may be a duty or excise in form, but it is a palpable effort to tax something other than the transfer. In this case the effort is to tax in 1922 in respect of something untaxable in 1910 (Cf. Lewellyn v. Frick, 268 U. S. 238, at 251, 45 S. Ct. 487, 69 L. Ed. 934). **We think this is an effort to use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action.**"

To measure the tax upon one person by property owned by another, and not given to such other as a substitute for a testamentary disposition in order to evade lawful taxes, results in such flagrant and palpable inequality between the burdens imposed and the benefits received that it necessarily implies a taking of private property for public use without just compensation, and amounts to extortion and spoliation under the guise of taxation. (See Dane v. Jackson, 256 U. S. 589, at p. 599; and Henderson Bridge Co. v. Henderson, 173 U. S. 592, at p. 614.)

In spite of these considerations, the Collector seeks to justify the two-year conclusive presumption as a rule of substantive law by stating that the penumbra theory (see dissent of Mr. Justice Holmes, in the Schlesinger case, supra) must be applied to prevent wholesale evasion of estate taxes. But can that theory, which is drawn from the law of police power, where no attempt is made to equalize governmental burdens, be applied to the case at bar? This Court, in the Schlesinger case, refused to permit it, saying (270 U. S., at p. 240) that rights guaranteed by the Constitution are not to be so lightly treated—are superior to this supposed necessity—and that a forbidden tax cannot be enforced in order to facilitate the collection of one properly laid. Its application was again denied in Untermyer v. Anderson, 276 U. S. 440 (see p. 451). So also this Court rejected this penumbra theory, in Hoeper v. Tax Commission of Wisconsin, 76 L. Ed. Advance Sheets No. 4, p. 145, at p. 148, in which Mr. Justice

Roberts, in speaking of the Wisconsin Income Tax Act, said:

> "Again, it is clear that the law is a **revenue measure**, and not one imposing regulatory taxes. • • • The present case does not fall within the principle that, where the Legislature, in prohibiting a traffic or transaction as being against the policy of a state, makes a classification reasonable in itself, its power so to do is not to be denied simply because some innocent articles come within the proscribed class (Purity Extract Co. v. Lynch, 226 U. S. 192, 204, 57 L. Ed. 184, 188, 33 S. Ct. 44). **Taxing one person for the property of another is a different matter.**"

See also Weaver v. Palmer Bros., 270 U. S. 402, at page 415, in which the Court said: "The constitutional guaranties may not be made to yield to mere convenience."

Nevertheless, the theory was used in Milliken v. U. S., 283 U. S. 15, at pages 24 and 25, in which this Court held constitutional the taxation of gifts actually made in contemplation of death, because such gifts **were substitutes for testamentary disposition.** However, the gifts in the case at bar have been found by the Court not to be substitutes for such dispositions—not to be an attempt to evade estate taxation. Consequently, for the penumbra theory to be applied in this case a much stronger justification for the violation of constitutional rights of the individual must be discovered.

The limitation upon the use of the penumbra theory

in police power cases was expressed by Mr. Justice Hughes in Purity Extract Co. v. Lynch, 226 U. S. 192, at page 204, when he stated that said theory would not be followed unless a contrary conclusion would save the nominal power while preventing its effective exercise, and that "the inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." Even assuming that this theory can be freely applied in tax cases, it is obvious that a contrary conclusion, viz., that gifts within two years of death shall not be deemed and held to have been made in contemplation of death, would not preserve merely the nominal power of federal estate taxation while preventing its effective exercise. Such a conclusion would leave in force the prima facie presumption with the aid of which the Treasury Department has been able during the period of 1917-1928 to collect $1,140,218,964.29 in estate taxes (Vol. 322, Estate Tax, C. C. H. Federal Tax Service, pp. 3013 and 3014). If such a sum of money can be collected without a conclusive presumption, there would seem to be no justification for fear of wholesale tax evasion if it were held unconstitutional. Moreover, since the gift tax was held constitutional in Bromley v. McCaughn, 280 U. S. 124, a doubtful point before that decision, there is no reason why Congress cannot preserve the revenue by the passage of another gift-tax act. If taxation of inter vivos gifts is a necessary public burden to prevent evasion of estate taxes, then all those who

make such gifts should equally share this burden. It is unfair to take only the property of those who chance to die within two years after their gifts for this public use. It is apparent, therefore, that the second sentence of section 302 (c) is merely an arbitrary legislative fiat.

For the above reasons, we respectfully contend that the two-year conclusive presumption in section 302 (c) cannot be held constitutional as a substantive rule of law. The conclusive presumption cases cited by the Collector are not contrary to this conclusion, for they involved rules of substantive law which Congress had constitutional power to make. The situation in the case at bar is different. And if it is not such a rule, then it must be a rule of conclusive evidence. So considered, is it constitutional? We think not.

Considering the two-year presumption in section 302 (c) as a rule of conclusive evidence, it must be held unconstitutional because it is an invasion by the Legislature of the exclusive prerogative of the judiciary to determine the truth of facts in issue. Thus, in Wigmore on Evidence, 2d Ed., Vol. 2, p. 1057, it is said:

> "The judicial function under the Constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the

exercise of an indestructible judicial function. To make a rule of conclusive evidence compulsory upon the judiciary, is to attempt an infringement on their exclusive province."

Furthermore, such presumption, so considered, is unconstitutional because, by preventing the disclosure of actual facts, it prevents one from being heard before he is condemned. The fundamental requirement of due process of law is an opportunity for a hearing and defense (Ballard v. Hunter, 204 U. S. 241, at page 255; Pittsburgh etc. R. R. Co. v. Backus, 154 U. S. 421, at page 426; Holden v. Hardy, 169 U. S. 366, at page 389, 390; and see Hoover v. McChesney, 81 F. 472, at page 481, quoting language of Mr. Webster in Dartmouth College v. Woodward, 4 Wheat. 518). Even prima facie presumptions are not allowed which directly or indirectly violate this requirement. (See Bailey v. Alabama, 219 U. S. 219, at page 239; Manley v. Ga., 279 U. S. 1, at page 6, and Bandini Petroleum Co. v. Superior Court, 76 L. Ed. Advance Sheets, page 123, at page 129, Nov. 23, 1931.) The essential facts which are constitutionally required for a "taking by due process of law" cannot be abolished by Congress. It is not within the power of any American legislature to deprive one of his property by making his adversary's claim to it conclusive of its own validity (Marx. v. Hanthorn, 148 U. S. 172, at pages 182, 183).

Moreover, this presumption, when considered as a rule of conclusive evidence, is unconstitutional for other reasons. Although the law of evidence is a creature of experience, this rule is not drawn from, but is contrary to, actual experience. "Presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them" (Fresh v. Gilson, 16 Pet. 327, at p. 331). As shown above, there is no rational connection between a gift and death within two years thereafter, the facts proved, and contemplation of death, the fact presumed. The inference of the latter fact from the former is unreasonable, irrational and purely arbitrary. It amounts to a legislative fiat, which takes the place of fact in a matter involving property rights, and as such has been condemned by this Court on numerous occasions. (See Manley v. Ga., 279 U. S. 16, at pages 6 and 7, and cases therein cited.)

As said in Lincoln v. French, 16 Otto (105 U. S.) 614, at p. 617:

> "But all presumptions as to matters of fact, capable of ocular or tangible proof, * * * are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown. * * * Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear presumptions disappear."

Nor is Rhode Island v. Palmer (National Prohibition Cases), 253 U. S. 350, 387-388, cited by the Collector on pages 19 and 42 of his brief, contrary to this statement. In regard to that case the Supreme Court of Florida, in Atlantic Coast Line R. R. Co. v. Gainsville, 83 Fla. 275, 91 So. 118, said:

> "It is no authority for the proposition that legislative bodies have power with regard to all physical facts to declare a thing to be so which is not so. Another authority counsel might have cited, but did not, is that of the monk Gorenflot, who, at the instance of Chicot, the jester, solemnly christened a chicken a carp in order that he might partake of it on Friday without violating his religious obligations."

The christening by Congress of all gifts over $5,000 within two years of death as being in contemplation thereof does not change the state of mind of the donor, does not convert truth into falsehood, and does not give such gifts the testamentary character necessary for federal estate taxation. It is merely an effort to use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action.

The Legislature cannot pass conclusive rules of evidence. Its power over such rules is a power to shape and mould, for the purposes of justice, the rules under which parties are to make a showing of their rights, and not a power to preclude their showing them (Cooley on Taxation, 4th Ed., Vol. 4, pages 3150 and 3151).

A constitutional prohibition against taxation of gifts within two years of death, not testamentary in character, cannot be transgressed, indirectly by the creation of statutory presumptions any more than it can be violated by direct enactment. The power to create presumptions is not a means to escape from constitutional restrictions (Mr. Justice Hughes in Bailey v. Ala., 219 U. S. 219, at page 239, and Macallen v. Commonwealth of Mass., 279 U. S. 620, at p. 629). Congress cannot be left free to make any "due process" by its mere will (Murray v. Hoboken Land Co., 18 How. 272, at page 276).

Conclusion.

In conclusion, we wish to call attention to the remarks made by this Court in Gulf, etc., Ry Co. v. Ellis, 165 U. S. 150, at page 154 (Mr. Justice Brewer), and in Wilkinson v. Leland, 2 Peters 625, at page 657 (Mr. Justice Story). In the former case it was said:

> "'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to

be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be obsta principiis.'

"While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."

And in the latter case it was said:

"That government can scarcely be deemed free where the rights of property are left solely dependent upon the will of a legislative body without restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."

If this conclusive presumption in Section 302 (c) is held constitutional, then no effective restraint against arbitrary action of Congress can be found in the Fifth Amendment. Conclusive presumptions can be made in every field of legislation. To permit this encroachment upon the private right of individuals is to make that amendment nothing more than a rope of sand.

For the above reasons, we respectfully submit that the answer to the first question certified to this Court by the

Circuit Court of Appeals for the Third Circuit must be: "Yes."

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